

Dissenting Views on H.R. 2844
The “Continuity in Representation Act of 2004”

The House Judiciary Committee favorably reported H.R. 2844, the “Continuity in Representation Act of 2003,” by a vote of 18-10, following a narrow sequential referral from the House Administration Committee. H.R. 2844 addresses the critical issue of how House vacancies are to be filled in the event a substantial number of Members are killed or incapacitated by a terrorist attack or other catastrophic incident. Although that issue, and how it is resolved, is a matter of national constitutional import, the referral to this Committee limited our jurisdiction to a single provision – the provision authorizing judicial review by a three-judge panel of the announcement by the Speaker that a sufficient number of vacancies exist to trigger the special election requirements of the bill. In our view, it is an abrogation of this Committee’s responsibility to restrict our consideration to such a minuscule, and arguably inconsequential, portion of the bill while avoiding the broader issues that implicate the very foundation of our tripartite form of government.

The events of September 11, 2001 brought into sharp focus the potential for the sudden, cataclysmic disruption of operations in one or more branches of our government. Specifically, had United flight 93 reached its intended destination the U.S. Capitol dome– the death or severe injury or disability of innumerable Members of Congress would have been imminent. Under the Constitution, although the 17th Amendment permits State governors to appoint Senators to vacant seats¹, there is no comparable provision for the prompt replacement of Members of the House of Representatives. Instead, Article I, Section 2, Clause 4 of the Constitution requires the executive authority of a State in which a vacancy occurs in the House to order a special election to fill the vacancy. But, Congress has the power under Article I, Section 4, Clause 1 of the Constitution to “make or alter” State laws governing “the times, places and manner of holding elections” for Members of the House of Representatives. Pursuant to that authority, H.R. 2844 would require the States, upon announcement by the Speaker of the House that the number of vacancies exceeds 100, to conduct special elections within 45 days of the announcement.

The only Committee to conduct hearings on H.R. 2844, the House Administration Committee, was deeply divided on the questions whether the bill adequately addresses the myriad issues concerning the continuity of Congress and whether the bill, independent of those issues, posed a workable solution, i.e., whether it would be feasible to conduct widespread special elections during a period of incalculable vacancies and national chaos. By a vote of 4-3, the bill was reported out of the House Administration Committee over the vigorous and comprehensive dissent of the minority. While it is unnecessary to repeat the substantive concerns enumerated in the minority’s dissenting views, it is important to emphasize its concern with the process. The dissent argued that the “bill’s narrow focus ignores broader questions of congressional continuity,” and recognized that proposals advocating a constitutional amendment to address House vacancies “if considered in the House, would fall under the jurisdiction of the House

¹The 17th Amendment provides no resolution in the event of widespread incapacitation of a majority of Senators. A vacancy has typically been understood to exist upon the death, resignation or expulsion of a Senator.

Judiciary Committee.” H.Rept. 108-404, pp. 12, 14. Yet H.R. 2844 has been tailored so as to avoid the scrutiny that we believe is warranted by this Committee.

At the markup of this bill, Chairman Sensenbrenner cited the expiration of this Committee’s sequential referral on January 31, 2004 as an impediment to conducting hearings on the broader issue of congressional continuity—including the possibility of a constitutional amendment—before the Judiciary Committee.² Yet as early as September 2003, in testimony before the House Administration Committee in support of H.R. 2844, Chairman Sensenbrenner indicated that there would be no further consideration of proposals to address filling House vacancies in the event of a national emergency in the 108th Congress by this Committee. The sole hearing by this Committee on this issue was held before the Subcommittee on the Constitution during the 107th Congress on February 28, 2002. H.J. Res. 67,³ “Providing for the Temporary Filling of House Vacancies,” called for a constitutional amendment to authorize the temporary appointment of individuals to fill House vacancies in a time of national emergency. There was, however, no Subcommittee markup or Full Committee consideration of the measure.⁴

Moreover, much has happened since the Subcommittee hearing on H.J. Res. 67. Several bills have been introduced in the House and the Senate urging a constitutional amendment. Also, significantly, the Continuity of Government Commission, a joint project of the American Enterprise Institute and the Brookings Institute, after months of study, issued a report in May 2003 recommending an approach totally at odds with H.R. 2844. Instead, the Commission concluded that the better approach was to pass a constitutional amendment to address mass vacancies in the Congress. The Commission was headed by honorary co-chairs former Presidents Jimmy Carter and Gerald Ford, and co-chairs Lloyd Cutler and former Senator Alan Simpson. Its members consisted of a diverse group of public servants (including former members of the House and Senate) such as Kenneth Duberstein, Thomas Foley, Charles Fried, Newt Gingrich, Nicholas Katzenbach, Kwesi Mfume, Leon Panetta and Donna Shalala. While we do not suggest that this Committee simply accept the recommendations of an outside panel, no matter how distinguished, of experts and scholars, we do believe that it is our obligation to review, consider and evaluate all available research on this issue before casting a vote that will define the stability or instability of our democracy for years to come.

²The Chairman also rejected the suggestion of Mr. Schiff of California to seek, through the Chairman and the Ranking Member, an extension of the referral from the Speaker.

³H.J.Res. 67 was introduced by Rep. Baird of Washington in the 107th Congress.

⁴The Judiciary Committee certainly is not loathe to consider proposals to amend the Constitution. Since the attacks on 9/11, the Judiciary Committee has held hearings or markups on at least three proposals to amend the Constitution: **May 21, 2003** - Full Committee Markup of H.J.Res. 4, Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States; **May 1, 2003** - Subcommittee on the Constitution Markup of H.J. Res.22, the “Balanced Budget Amendment”; **March 6, 2003** - Subcommittee on the Constitution Legislative Hearing on H.J. Res. 22, the “Balanced Budget Amendment,” and **May 9, 2002** - Subcommittee on the Constitution Legislative hearing on H.J. Res.91, the “Victims Rights Amendment,” a Proposed Amendment to the United States Constitution.

After September 11, 2001, the unimaginable have become imaginable. A constitutional amendment to address the now imaginable circumstance of massive House vacancies may or may not be necessary. What is necessary, however, is that this Committee assumes its responsibility to vet seriously and fully the wide array of proposals, and their implications, to fill House vacancies in the event of a national calamity. Our obligation to our constituents, indeed to our democracy, requires no less. Because the Committee has opted instead to rush through what may be an ill-advised statutory fix, we dissent.

Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Zoe Lofgren
Martin T. Meehan
William D. Delahunt
Anthony D. Weiner
Adam B. Schiff
Linda T. Sanchez